RE: ELAINE TAN SWEE HONG; *EX PARTE*: DEUTSCHE BANK AKTIENGESELLSCHAFT

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD YATIM J.
[BANKRUPTCY NO. D4-29-1819-1991]
3 JUNE 1994

PRACTICE & PROCEDURE: Appeal against receiving and adjudication order - Validity of bankruptcy notice - Claim in foreign currency - Whether permission of Controller of Foreign Exchange required - Consideration of r. 91 & Form 5 Bankruptcy Rules 1969, Exchange Control (Form of Bankruptcy Notice) Order 1992 - Sections 8, 9, Items 1, 4, 5 of Fourth Schedule Exchange Control Act 1953 - Para 4(i) Schedule IV Exchange Control Act 1947 (UK).

BANKRUPTCY: Validity of bankruptcy notice - Claim in foreign currency - Sections 8 & 9 Exchange Control Act 1953 - Provision prohibiting making any payments to person resident outside Malaysia without permission of Controller of Foreign Exchange - Permission not obtained - Whether demand for payment of debt due in the bankruptcy notice was defeated by the fact that permission not obtained from Controller - Whether claim in bankruptcy notice satisfied by payment in ringgit equivalent - Consideration of Items 1, 4, & 5 of Fourth Schedule Exchange Control Act 1953 - Para 4(i) Schedule IV Exchange Control Act 1947 (UK).

This was an appeal by the judgment debtor against the decision of the Deputy Registrar who made receiving and adjudication orders against him. The judgment debtor raised the issue that the bankruptcy notice was bad in law as it contravened the Exchange Control Act 1953 (The Act).

It was the contention of Counsel for the judgment debtor that the bankruptcy notice requiring payment to be made in Singapore currency did not conform with Form 5 of the bankruptcy rules. He further submitted that in accordance with the provisions of ss. 8 and 9 of the Act, the permission of the Controller was required for payments to be made in Malaysia to a person resident outside Malaysia. Consequently, any payment pursuant to the bankruptcy notice would contravene the Act.

Counsel for the judgment creditor replied that although the permission of the Controller was required, nonetheless item 4 of the Fourth Schedule provided that a claim for the recovery of money would not be defeated merely because permission had not been obtained. She further added that even if permission was required, the judgment debtor had the choice of paying in ringgit.

[1] A reading of the relevant provisions of the Exchange Control Act 1953 revealed that s. 8 provides that no payments are allowed to be made in Malaysia to a person resident outside the scheduled territories without permission of the Controller of Foreign Exchange. Further s. 9 prohibits any payment made outside Malaysia without the permission of the Controller. Item 1 of the Fourth Schedule provides that ss. 8 & 9 shall apply to sums required to be paid by any judgment or order of any Court in Malaysia. But under item 4, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Controller.

[2] Item 4(1) of the Fourth Schedule was in *pari materia* with paragraph 4(1) of Schedule IV to the Exchange Control Act, 1947 of the United Kingdom. Para 4(1) of Schedule IV was the subject of litigation in *Control & Trading Co. (Southern) Ltd. v. Barbey & Ors* [1990] AC 244 and applying the principles established therein, it followed that a demand for the repayment of a debt due in the bankruptcy notice was not defeated by the fact that the permission of the Controller had not been obtained. Accordingly, the bankruptcy notice herein had not contravened the Act, and was therefore valid. The judgment debtor could have complied with the bankruptcy notice by making payment in the ringgit equivalent.

[Appeal dismissed with costs].

Cases referred to:
Control & Trading Co. (Southern) Ltd v. Barbey & Ors [1960]AC 244 HL ***(foll)***
Bank of New Zealand v Wong Kee Tat [1990] 2 MLJ 435 [1990] 2 CLJ ***(foll)***

Legislations referred to:
Bankruptcy Rules 1969, r. 91 & Form 5
Exchange Control Act 1953, ss. 8, 9, Items 1, 4 & 5 of Fourth Schedule
Exchange Control (Form of Bankruptcy Notice) Order 1992
Exchange Control Act 1947, para 4(i) Schedule IV (UK)

For the judgment debtor - C.T. Tan; M/s. K.K. Chong, Chai & Koo
For the judgment creditor - S. Mogan; M/s. Shearn Delamore & Co.

JUDGMENT

Dr. Zakaria Bin Mohd Yatim J:
This is an appeal by the judgment debtor against the decision of the Deputy Registrar who made receiving and adjudication orders against the judgment debtor.

The only issue raised at the hearing of the appeal was that the bankruptcy notice was bad in law in that it contravened the Exchange Control Act, 1953 (Act 17).

Mr. C T Tan, Counsel for the judgment debtor referred to the bankruptcy notice which is reproduced below:

BANKRUPTCY NOTICE

To: Elaine Tan Swee Hong
5th Floor, President House,
Jalan Sultan Ismail,
50250 Kuala Lumpur.

Take notice that within seven (7) days after service of this notice on you excluding the day of such service, you must pay to Deutsche Bank Aktiengesellschaft (formerly Deutsche Bank (Asia) Aktiengesellschaft and also formerly European Asian Bank Aktiengesellschaft) a Bank in incorporated in West Germany and having a registered office at 8 Shenton Way, 20-01, Treasury Building, Singapore 01-06 and care of Messrs Shearn Delamore & Co. and Drew & Napier, Standard Chartered Bank Building, No. 2 Benteng, 50050 Kuala Lumpur in the Federal Territory the sum of S$3,257,607.51 or the Ringgit equivalent at the time of payment claimed by them as being the amount due on a final Judgment together with interest and RM350 costs obtained by them against you in the High Court at Kuala Lumpur in Suit No. D3-23-2419-88 dated the 19 November 1990, whereon execution has not been stayed, or you must secure or compound for the said sum to their satisfaction or the satisfaction of the Court; or you must satisfy the Court that you have a counter-claim, set off, or cross demand against Deutsche Bank Aktiengesellschaft (formerly Deutsche Bank (Asia) Aktiengesellschaft and also formerly European Asian Bank Aktiengesellschaft) which equals or exceeds the sum claimed by Deutsche Bank Aktiengesellschaft and also formerly European Asian Bank Aktiengesellschaft) and which you could not set up in the action in which the Judgment was obtained.

Dated 10 April 1991

By the Court,

Sgd.
Senior Assistant Registrar
High Court, Kuala Lumpur

Mr. C T Tan said that the judgment debtor was not told whether permission had been obtained for the judgment debtor to pay in Singapore dollars. He added that the bankruptcy notice, which required payment to be made in Singapore dollars did not conform with Form 5. He referred to ss. 8 & 9 of the Exchange Control Act, and submitted that any payment pursuant to the bankruptcy notice would contravene the Exchange Control Act. He also referred to ss. 36(1), (2) & (3) and the Fourth Schedule to the Act. Accordingly, he said, non compliance with the bankruptcy notice did not constitute an act of bankruptcy.

Miss S. Mogan, Counsel for the judgment creditor submitted that under ss. 8 & 9 of the Exchange Control Act permission is required before any funds transmitted out of Malaysia. She referred to items 4 & 5 of the Fourth Schedule and said that the claim for the recovery of money would not be defeated merely because permission had not been obtained. She added that even if permission was required, the judgment debtor could have paid to Messrs. Shearn Delamore & Co. in ringgit.

I have read the relevant provisions of the Act. Section 8 provides that no payments are allowed to be made in Malaysia to a person resident outside the schedule territories without the permission of the Controller of Foreign Exchange. Section 9 prohibits any payment made outside Malaysia without the permission of the Controller. Item 1 of the Fourth Schedule provides that Sections 8 and 9 shall apply to sums required to be paid by any judgment or order of any Court in Malaysia. But under item 4, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Controller. Item 5(1) provides that in "any bankruptcy ... a claim for a sum not payable without the permission of the Controller shall, notwithstanding that the permission has not been ... be admitted to proof as if it had been given.."

Item 4(1) of the Fourth Schedule is in *pari materia* with paragraph 4(1) of Schedule IV to the Exchange Control Act, 1947 of the United

Kingdom. In *Contract & Trading Co. (Southern) Ltd. v. Barbey & Others* [1960] AC 244, the House of Lords decided that paragraph 4 of Schedule IV was apt to include an obligation arising under a bill of exchange as well as any other monetary obligations. A debt existed eventhough treasury permission had not been granted and it might not be paid without that permission. Accordingly, a debt under a bill of exchange was one to which paragraph 4 applied, and a claim for this recovery was not defeated by the fact that permission to pay had not be given.

The above decision of the House of Lords was followed by Eusoff Chin J, as he then was, in *Bank of New Zealand v. Wong Kee Tat* [1990] 2 MLJ 435 where the learned Judge held that a loan transaction was not illegal and void simply because the permission of the Controller of Foreign Exchange had not been sought.

Following the decision in *Contract and Trading Co,* under paragraph 4 of the Fourth Schedule a demand for the repayment of a debt due in the bankruptcy notice is not defeated by the fact that the permission of the Controller has not been obtained.

Under the Exchange Control (Form of Bankruptcy Notice) Order, 1992, [P.U.(A) 127/921 the form of the bankruptcy notice to be used for the purposes of the Act shall be in Form No. 5 as prescribed by r. 91 the Bankruptcy Rules 1969.

In my opinion the bankruptcy notice does not contravene the Exchange Control Act and it is a valid notice issued in pursuance of the law. It conforms with Form 5 of the Bankruptcy Rules. The judgment debtor did not comply with the bankruptcy notice. Failure to comply with the bankruptcy notice constitutes an act of bankruptcy. The judgment debtor could have complied with the bankruptcy notice by making payment to Messrs. Shearn Delamore & Co. in Kuala Lumpur in the ringgit equivalent.

For the reasons stated above, I dismissed the appeal with costs.

RE: SHARIFAH MOHSIN; *EX PARTE*: PERWIRA HABIB BANK MALAYSIA BERHAD

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[BANKRUPTCY NO. 29-971-91]
25 FEBRUARY 1993

BANKRUPTCY: Bankruptcy notice - Creditor's petition - Supporting affidavits and affidavit-in-reply filed and served - Grounds raised at hearing not in affidavit-in-reply - Preliminary objections by judgment creditor - Non-compliance with r. 117 of Bankruptcy Rules 1969 - Whether r. 274 of Bankruptcy Rules 1969 could be invoked - Acceptance by creditor of partial payment of debt by third party - Whether bankruptcy notice nullified by such acceptance - Necessity of remainder of maintaining debt at the minimum statutory requirement - Sections 3(1)(i), 5(1)(a), 6(2) Bankruptcy Act 1967.

In pursuance to a bankruptcy notice and creditor's petition, three supporting affidavits were served on the judgment debtor. In the affidavit-in-reply, the judgment debtor deposed that there was non-disclosure of material fact which violated s. 5(2) of the Bankruptcy Act. She further contended that there was a discrepancy in the amount owed by the judgment debtor, and therefore the creditor's petition was a nullity. However, on the hearing of this matter, the judgment debtor departed from the issues aforesaid and opted for new grounds altogether. She contended instead that the judgment creditor had contravened s. 3(1)(i) of the Bankruptcy Act 1967, as the bankruptcy notice was not in accordance with the terms of judgment relied upon by it and secondly, that the bankruptcy notice was fundamentally defective, it being issued against a single person while judgment was obtained against co-defendants. And it was finally contended that the judgment creditor's acceptance of partial payment had precluded the judgment creditor from relying on the original judgment for the purpose of the petition as there existed an agreement after judgment for payment of monies to the judgment creditor.

Held:

[1] The judgment debtor had contravened r. 117 of the Bankruptcy Rules,1969 as she had failed to depose the relevant grounds raised during the hearing in her affidavit-in-reply. The Court refused to invoke r. 274. Since the purpose